No. 92-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, *et al.*,
Appellants,

v.

WILLIAM BARR, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

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BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund and the National Association for the Advancement of Colored People submit this brief as *amici curiae* with the consent of the parties in support of appellees' position that North Carolina's adoption of a congressional redistricting plan different from that allegedly suggested by the United States Attorney General does not subject North Carolina's plan to judicial invalidation on the grounds that it constitutes invidious race conscious redistricting. Protection of the voting rights of minorities is an important aspect of the work of each of the *amici*, as demonstrated by their frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President Kennedy to

involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented black citizens in voting rights cases before this Court, including *Smith v. Clinton*, 488 U.S. 988 (1988), and *Connor v. Finch*, 431 U.S. 407 (1977), and has appeared in other significant voting rights cases in this Court. *See Clark v. Roemer*, 500 U.S. ___, 111 S. Ct. 2096 (1991).

The American Civil Liberties Union ("ACLU") is a nationwide organization with over 250,000 members. Since 1965, the ACLU has maintained a Southern Regional Office whose primary emphasis has been challenging barriers to political participation by minorities, including at-large elections, discriminatory reapportionment, and failure to comply with preclearance under § 5 of the Voting Rights Act. It has participated in scores of voting rights cases, including *Rogers v. Lodge*, 458 U.S. 613 (1982); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Hunter v. Underwood*, 471 U.S. 222 (1985); and *Georgia Board of Elections v. Brooks*, ___ U.S. ___, 111 S. Ct. 288 (1990). The ACLU was actively involved in the preclearance process which resulted in the creation of the majority black Congressional district in North Carolina at issue in this case.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, has frequently appeared before this Court in such cases, *see, e.g.*, *City of Lockhart v. United States*, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, *see Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. ___, 111 S. Ct. 681 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, *see, e.g.*, *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992).

The National Association for the Advancement of Colored People ("NAACP") is a non-profit organization with substantial numbers of members nationwide. The NAACP has chartered affiliates in the State of North Carolina. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have an equal and full opportunity to participate in the political process and to elect representatives of their choice. The NAACP fought for passage of the Voting Rights Act of 1965 and thereafter has sought to ensure the voting rights of minorities through legislative advocacy and litigation.

QUESTION PRESENTED

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own. *Shaw v. Barr*, ___ U.S. ___, 113 S. Ct. 653-54 (1992).

SUMMARY OF ARGUMENT

The decision by North Carolina to create a second legislative district with a majority black population in order to comply with the Voting Rights Act of 1965 is not subject to constitutional challenge, whether or not the North Carolina legislature acceded to the plan suggested by the United States Attorney General. Compliance with the Attorney General's suggestions is not the test for whether race-conscious redistricting is constitutional. This Court has repeatedly upheld, both explicitly and implicitly, the constitutionality of race conscious redistricting or reapportioning in order to comply with the Voting Rights Act. The Constitution does not require, as appellants contend, color blind redistricting. Thus, as long as a state legislature is attempting to comply with the Voting Rights Act's prohibition against, *inter alia*, diluting the voting rights of minorities, and the legislature does not unfairly dilute the voting rights of the white majority, the legislature's action is *per se* constitutional.

This is so because race conscious redistricting in order to comply with the Voting Rights Act does not discriminate against white voters. Race conscious redistricting does not deprive white voters of any rights or entitlements: white voters have no constitutionally protectible right to vote in a white majority district or to elect a white representative or to insist that legislative districts be compact or contiguous. As this Court held in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977) (plurality opinion) ("*UJO*"), so long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race."

The fact that North Carolina or any other state legislature does not adopt a particular redistricting plan suggested by the Attorney General is irrelevant to the constitutionality analysis. *First*, the Attorney General's role under the Voting Rights Act is merely to preclear changes in voting procedures by states subject to Section 5 of the Voting Rights Act. Nothing in the Voting Rights Act or this Court's *UJO* decision gives the Attorney General the power to immunize a redistricting decision from constitutional challenge. Said another way, race conscious redistricting is constitutional because it does not discriminate against white voters, not because of any imprimatur by the Attorney General. It does not become constitutionally suspect simply because the state does not choose to have the Attorney General prescribe the details of the districting plans.

Second, it would be fundamentally inconsistent with the Voting Rights Act to give the Attorney General such a critical role. If a state legislature subject to Section 5 of the Act voluntarily draws a redistricting plan that complies with the Act on its first try, there will be no occasion for the Attorney General to offer an alternative plan. And, if a state is not subject to Section 5, there is no opportunity even for the Attorney General to review its redistricting plan. There is, in short, no principled constitutional or statutory basis to say that a voluntarily drawn plan is subject to constitutional challenge, while a

plan drawn to comply with a suggestion by the Attorney General is not.

And *finally*, to require that the Attorney General "suggest" any race conscious redistricting plan before it could be considered safe from constitutional challenge would both conflict with this Court's well-recognized deference to legislative judgments in redistricting and present an administrative nightmare for a Department of Justice that is already overburdened by its preclearance responsibilities.

In sum, North Carolina's redistricting plan is constitutional because it does not discriminate against white voters. The fact that North Carolina did not adopt the Attorney General's suggested plan does not affect that analysis at all. The District Court's decision dismissing Appellants' challenge to North Carolina's redistricting plan should be affirmed.

ARGUMENT

I. APPELLANTS HAVE NO CLAIM THAT NORTH CAROLINA'S REDISTRICTING PLAN IS DISCRIMINATORY OR VIOLATES THE CONSTITUTION BECAUSE THEY HAVE SUFFERED NO COGNIZABLE INJURY.

Appellants' constitutional challenge to North Carolina's redistricting plan (the "Plan") fails for the most basic of reasons: they have not suffered any cognizable, constitutional injury as a consequence of the Plan nor can they prove that the North Carolina legislature acted with invidious intent in enacting the Plan.

At bottom, appellants' allegation is that every race conscious redistricting plan perforce violates the Constitution. Appellants are wrong. So long as a race conscious redistricting plan does not unfairly minimize the voting strength of white voters as a group, race conscious redistricting to comply with the Voting Rights Act is constitutional. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (plurality opinion) ("*UJO*"). There is no allegation here that the voting rights of whites have been impermissibly

diluted. Accordingly, appellants' constitutional challenge to the Plan must fail.

A. The Constitution Does Not Require Color-Blind Redistricting.

There is simply no constitutional mandate, as appellants apparently claim, that the redistricting process be color blind. As this Court long ago recognized in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Voting Rights Act of 1965, 42 U.S.C. §§ 1973a to 1973ff-6, was passed to prohibit and remedy a historical pattern of discrimination against minorities in voting.

> The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country.

383 U.S. at 308.

This Court has repeatedly held, both explicitly and implicitly, that the Voting Rights Act is constitutional and that race conscious redistricting or reapportionment in order to comply with the Voting Rights Act is permissible under the Constitution. *See UJO*, 430 U.S. 144; *Beer v. United States*, 425 U.S. 130 (1976); *City of Richmond v. United States*, 422 U.S. 358 (1975); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301. As this Court recognized in *UJO*, implicit in this Court's many precedents interpreting the Voting Rights Act is "the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. . . . [N]either the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." 430 U.S. at 161.

Indeed, only three years ago, this Court expressly reaffirmed that holding in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990):

> [M]any of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We have held, for example, that in safeguarding the "'effective exercise of the electoral franchise'" by racial minorities, *United Jewish Organizations v. Carey*, 430 U.S. 144, 159, 97 S.Ct. 996, 1007, 51 L.Ed.2d 229 (1977) (plurality opinion), quoting *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976), "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." 430 U.S., at 161, 97 S.Ct., at 1007-1008. Rather, a State subject to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended 42 U.S.C. § 1973c, may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." 430 U.S., at 161, 97 S.Ct., at 1007.

Metro Broadcasting, 497 U.S. at 583-84.

In fact, the remedial purposes of the Voting Rights Act could not be accomplished if, as appellants contend, the states were required to engage in color-blind redistricting. Section 2 of the Act mandates a "results" or "effects" test; any redistricting plan that results in the dilution of minority voting rights, as defined in the Act, violates § 2, whether or not that dilution is intentional. Thus, a state like North Carolina with a significant minority population can not ensure that it complies with the Voting Rights Act without examining several factors. Those include the geographic concentration of minority voters and the possibility and desirability of creating one or more districts with a majority of minority voters. Indeed, if states ignored those factors and engaged in color blind redistricting their chances of violating § 2 of the Voting Rights Act would be quite high. Certainly, it makes no sense

to argue that states must comply with § 2 of the Act but they are forbidden to do so on purpose.

Moreover, to require color-blind redistricting would be to ignore and subvert the political realities of the Voting Rights Act and the redistricting process. That process necessarily considers and turns upon political consequences. As this Court has pointed out in the one-person, one-vote context, "[d]istrict lines are rarely neutral phenomena. . . . The reality is that districting has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). If, as this Court noted in *Metro Broadcasting*, "minorities have particular viewpoints and interests worthy of protection," 497 U.S. at 583, then a rule requiring color-blind redistricting would impose upon minorities a special disadvantage not visited upon any other interest group. That result would be flatly contrary to the plain intent of the Voting Rights Act. Maintaining cohesive communities of interest is a legitimate state interest in redistricting — and it applies whether the community is majority white or majority black. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

Further, a constitutional rule requiring color-blind redistricting would inevitably result in a double standard, heavily weighted against black voters. Legislators invariably know the racial composition of districts they are creating. Subjecting minority dominant districts to strict scrutiny analysis, thus requiring the state to demonstrate a compelling state interest in designing that particular district, while not requiring a similar demonstration for white districts creates a cruel and indefensible distinction.[1]

In sum, this Court has repeatedly upheld the constitutionality of race conscious redistricting in order to comply with

1. Thus, proscribing consideration of the plan's impact on a racial group would itself be a race-conscious rule, one that disadvantages precisely those whom the Voting Rights Act was designed to protect. *See* David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 114 (1986).

the Voting Rights Act. Appellants' bald attempt to overrule those well-settled precedents should be summarily rejected.[2]

B. White Voters Suffer No Cognizable Fourteenth Or Fifteenth Amendment Injury If The Plan Does Not Dilute The Voting Strength Of Whites As A Group And Is Not Motivated By An Invidious Intent Toward Them.

Moreover, appellants have not suffered any constitutional injury as a consequence of North Carolina's Plan. For that reason alone, appellants' constitutional claims should be rejected.

In order to make out a claim of invidious discrimination in voting in violation of the Equal Protection Clause of the Fourteenth Amendment, this Court has consistently held that challengers must demonstrate that the scheme operates to minimize or cancel out the voting strength of the racial group as a whole. *See, e.g., White v. Regester*, 412 U.S. 755 (1973) (in state legislative reapportionment scheme, relatively minor population deviations among districts did not substantially dilute the weight of individual votes so as to deprive voters of fair and effective representation); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (holding that the plaintiffs' burden is to establish that the political process is not equally open to participation by the group in question and that its members had less opportunity than did residents in the district to participate in the political processes and to elect legislators of their choice). Indeed, in the context of the Voting Rights Act, this Court has expressly held that as long as whites "as a group, [are] provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race." *UJO*, 430 U.S. at 166.

2. "Time and again this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law. . . . Adherence to precedent promotes stability, predictability and respect for judicial authority. . . . For all of these reasons we will not depart from the doctrine *of stare decisis* without some compelling justification. " *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. ___, ___, 112 S. Ct. 560, 563-64 (1991) (citations omitted).

In short, under the Fourteenth Amendment, appellants have no claim unless they can show that, as a group, the voting rights of whites have been diluted or otherwise impaired. The record is bereft of any such evidence or even allegation. Appellants have not even attempted such a showing here.

Under the Fifteenth Amendment, a claimant must allege that his or her ability and freedom to vote has been intentionally denied or abridged on account of his or her race. *City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980). Here, appellants have not alleged that their freedom to vote has been denied, intentionally or unintentionally. Rather, appellants contend only that their individual rights were violated when they were placed in a district where the majority of voters are minority group members or when North Carolina drew district lines that were not sufficiently compact or contiguous, whatever those standards might mean. But appellants have no such rights under the Fourteenth or Fifteenth Amendments.

As this Court held in *UJO*, a state is free to consider race in drawing district lines so long as it does not violate the Fourteenth and Fifteenth Amendment rights of white voters. 430 U.S. at 159-68. If white voters as a group are fairly represented statewide, their constitutional rights are not violated. *Id.* at 166.

Thus, white voters are not constitutionally entitled to elect a white representative to Congress or to live in a district where the majority of voters are white. No racial group, minority or majority, has a right to elect representatives in proportion to their percentage of the overall population. *See, e.g., Whitcomb v. Chavis*, 403 U.S. at 149 (the fact that the number of legislators who were ghetto residents was not in proportion to the percentage of the population who were ghetto residents does not prove invidious discrimination absent evidence that ghetto residents had less opportunity than other voters to participate in the political process and to elect legislators of their choice). Indeed, the 1982 amendments to § 2(b) of the Voting Rights Act incorporate this principle, stating that "nothing in [§ 2] establishes a right to have

members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973a.

This Court has consistently held that an individual voter "has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote." *UJO*, 430 U.S. at 166. Thus, "[t]he mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political systems." *Whitcomb*, 403 U.S. at 154.

In sum, North Carolina did not prevent white voters such as appellants from participating in the political process nor did it otherwise impair any of their constitutional rights when it created a second district with a majority of minority voters. Accordingly, in the words of *UJO*, North Carolina "was free to do what it did," whether or not it complied with any suggestions by the Attorney General. 430 U.S. at 165 (plurality opinion).

C. Color Conscious Redistricting Is Especially Appropriate in North Carolina.

The Voting Rights Act, and particularly § 5, is a remedial statute, intended to ensure that minorities do not suffer discrimination in voting in states which historically used discriminatory practices to disenfranchise minorities. "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution . . . [and] concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. at 309. In short, the Voting Rights Act represents a conscious decision on the part of the Congress "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328; *see also* H.R. REP. NO. 439, 89th Cong. 1st Sess. (1965), *reprinted in* 1965

U.S.C.C.A.N. 2540 ("*House Report*") (Joint Views of 12 members of the Judiciary Committee related to the Voting Rights Act of 1965).

It is particularly appropriate for North Carolina to take race into account in its efforts to comply with the Voting Rights Act. The past history of that state in burdening and disenfranchising minority voters compelled that corrective action. North Carolina was one of nine states using literacy tests and other devices to exclude black voters when the Voting Rights Act was passed in 1965. *House Report*, 1965 U.S.C.C.A.N. at 2444. Similarly, North Carolina at that time had well-documented policies of racial discrimination in other areas such as travel, recreation, education and hospital facilities. *Id.* Thirty-four of North Carolina's counties were designated in 1965 as "covered" counties under § 4(b) of the Act, thus requiring preclearance by the Attorney General of any changes in voting procedures. *Id.* at 2445.

North Carolina continued to lag behind in recognizing and enforcing minority voting rights even after the passage of the Voting Rights Act. By the time the Voting Rights Act was extended in 1970, the number of "covered" counties in North Carolina had actually risen from 34 to 39. H.R. REP. NO. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3279; *House Report*, 1965 U.S.C.C.A.N. at 2445.

In 1975, when certain sections of the Voting Rights Act were being reconsidered by Congress, the most recent available data concerning black registrations showed a disparity of 17.8 percent between black and white voter registration in North Carolina. S. REP. NO. 295, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 779. "[I]n six of the covered counties in North Carolina, white registration [exceeded] that of blacks by more than 25 percentage points." *Id.* at 780.

North Carolina's lack of commitment to minority voting rights, particularly as reflected in its 1981 congressional redistricting plan, was criticized again when the Voting Rights Act was extended in 1982. *See* S. REP. NO. 417, 97 Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177,

188. And, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court affirmed a finding that certain at-large districts drawn by North Carolina after the 1980 census diluted minority voting rights in violation of § 2 of the Voting Rights Act. In *Thornburg*, this Court further found that voting in North Carolina was racially polarized; that there were severe socio-economic disparities between whites and blacks; that black voter registration rates were disproportionately low; that statewide electoral campaign had been marked by racial appeals to white voters; and that candidates preferred by black voters were routinely defeated by white bloc voting. *See* 478 U.S. at 80.

Indeed, until 1992, no black had been elected to represent North Carolina since 1901. James Bennet, *The 1992 Elections: State by State*, N.Y. TIMES, Nov. 5, 1992, at B12. And even the current Plan overrepresents whites as a percentage of the overall population: blacks constitute 22% of North Carolina's population, yet only two of twelve districts, or 17 percent, are majority-minority districts. *See* App. Br. at 57.

In light of that history, North Carolina's 1992 use of race conscious redistricting in order to comply with the Voting Rights act is a necessary, appropriate and minimally required response to past wrongs. Appellants' criticisms of that effort ring especially hollow.[3]

Both before and after *UJO*, the federal courts have routinely recognized the necessity for race conscious redistricting in order to comply with the Voting Rights Act. *See, e.g.*, *Jeffers v. Clinton*, 730 F. Supp. 196, 217 (E.D. Ark. 1989) (where racially polarized voting existed and where the number of majority-minority districts was known, there was a "presumption that any plan adopted should contain that number of majority-black districts"), *aff'd mem.*,

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3. Given this history, we submit that even if this Court were to find that race conscious redistricting is generally not allowable (which we submit it should not), it certainly should be allowed to redress past wrongs when the Attorney General objects to a plan on the ground that additional majority-minority districts are required in order to comply with the Voting Rights Act.

___ U.S. ___,111 S. Ct. 662 (1991); *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984) (rejecting district court's plan because it did not take into account that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice"), *cert. denied*, 471 U.S. 1135 (1984); *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 148-52 (5th Cir.) (rejecting supervisors' reapportionment plan because, despite the existence of bare minority population majorities in two districts and the fact that an ameliorative plan might require a racial gerrymander, the plan did not afford blacks a reasonable opportunity to elect officials of their choice), *cert. denied*, 434 U.S. 968 (1977); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.) (court-ordered plan created a congressional district "with a clear black voting age population majority" that was "sufficient to overcome the effects of past discrimination and racial block voting"), *aff'd mem. sub nom. Mississippi Republican Executive Comm'n v. Brooks*, 469 U.S. 1002 (1984).[4] There is no constitutional justification for a rule that courts can order race conscious redistricting in order to comply with the Voting Rights Act, but that the states cannot avoid a violation of the Act by voluntary action to protect minority voting strength.

D. Non-Compactness Or Non-Contiguity Is Not A Basis To Invalidate The Plan.

Appellants and their supporting *amici* characterize the second majority-minority district drawn by North Carolina as "bizarre" "political pornography" and suggest that its lack of

4. This Court's decision in *Metro Broadcasting*, further supports the notion that North Carolina's race conscious redistricting is constitutional. There, the Court held that minority preference policies of the Federal Communications Commission do not violate the Equal Protection Clause incorporated in the Fifth Amendment. The Court found that such policies, as approved by Congress, were substantially related to the important governmental interest of achieving diverse programming. 497 U.S. at 569-71. Surely, North Carolina's goal of compliance with the Voting Rights Act is at least as substantially related to the important governmental interest of avoiding the dilution or impairment of minority voting rights — and hence equally constitutional.

compactness somehow makes it constitutionally suspect. *See* App. Br. at 61. But it has never been the law that the Fourteenth or Fifteenth Amendment — or any other constitutional provision — requires compactness or contiguity.

Thus, although compactness and contiguity are legitimate policies which states may consider when formulating plans for redistricting, *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983); *Reynolds v. Sims*, 377 U.S. 533, 578 (1964), the lack of those qualities in a districting plan, or in one district within a plan, is not a constitutional violation. As this Court has recognized, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement" for redistricting schemes. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (concluding that minor population variations among districts did not violate the Fourteenth Amendment, despite the challengers' characterization of the districts' shapes as "indecent"); *see also Cline v. Robb*, 548 F. Supp. 128, 133 (E.D. Va. 1982) (reapportionment plan which attained population equality among single-member districts did not violate equal protection, noting that compactness and contiguity are not requirements of equal protection); *Cook v. Luckett*, 735 F.2d 912, 920 (5th Cir. 1984) (district court erred in rejecting reapportionment plan on the grounds that its districts were "bizarrely shaped"). Thus, even the most tortured district is not suspect merely by reason of its shape.[5]

Indeed, North Carolina's recent redistricting plan was challenged in part on compactness and contiguity grounds in a parallel political gerrymander lawsuit. That action was dismissed by the district court and that dismissal was affirmed by this Court. *Pope v. Blue*, No. 3:92CV71-P, 1992 WL 378742

5. Early in this century, federal law required compactness of districts. That law expired, however, and subsequent laws omitted any such requirement. *Wood v. Broom*, 287 U.S. 1, 6 (1932). As the Court held in *Wood*, "[i]t was manifestly the intention of the Congress not to reenact the provision as to compactness. . . ." *Id.* at 7. Consequently, to impose a judicially created requirement of compactness for congressional districts, where the constitutional imperative for compactness was deliberately not reenacted, would arguably fly in the face of Congress' expressed intent not to mandate such standards.

(W.D.N.C. Apr. 16, 1992), *aff'd mem.*, ___ U.S. ___, 113 S. Ct. 30 (1992).

Nor does lack of compactness or contiguity add anything to appellants' equal protection or Fifteenth Amendment arguments. To the contrary, the federal courts have often rejected such arguments even where the state in question had its own law requiring compactness or contiguity. *See, e.g., Fletcher v. Golder*, 959 F.2d 106, 109-10 (8th Cir. 1992) (county voting district reapportionment plan did not fail to satisfy Missouri compactness requirement merely because it resulted in districts which had "branches," where branches were necessary to achieve minority representation); *Jordan*, 604 F. Supp. 807 (court-ordered interim redistricting plan created a noncompact minority district in part because it yielded the least adverse impact on the black voting influence in another district).

Furthermore, a requirement of compactness provides no assurance of fairness. "[T]he use of highly compact districts may be the most effective way to shut out a minority from equal participation. A strict compactness requirement would leave groups that could benefit from slightly stretching out districting lines remediless." Joseph Markowitz, *Constitutional Challenges to Gerrymanders*, 45 U. CHI. L. REV. 845, 879 (1978).

Moreover, a *per se* requirement of compactness would be unmanageable. There is no agreed-upon definition of, nor method for measuring, compactness. *See Karcher*, 462 U.S. at 756 n.19 (Stevens, J., concurring); *see also* Bernard Grofman, *Criteria For Districting: A Social Science Perspective*, 22 U.C.L.A. L. REV. 77, 84 (1985) ("[t]here are many different ways of applying a compactness requirement but none is generally accepted as definitive"). In fact, state requirements for compactness and contiguity "have been of limited utility because they have not been defined and applied with rigor and precision." *Karcher*, 462 U.S. at 756 (Stevens, J. concurring).

Indeed, the alternative plans for a second black majority district in North Carolina implicit in the Assistant Attorney General's objection notice[6] were themselves suspect on that score because the resulting districts would have had "irregular" shapes.[7] Moreover, if compactness is a federal requirement, it cannot be a requirement limited only to black majority districts. States create noncompact districts for many reasons: to recognize communities of interest, to protect incumbents, and to achieve partisan advantage.[8] Creating a federal right to compact districts therefore would subject virtually every plan to a challenge on the grounds that more compact districts could have been created — a threshold easily met. The Court should not fall into that trap.

E. Appellants' Reliance On This Court's Recent Equal Protection Decisions Is Misplaced.

Finally, appellants' reliance on recent equal protection decisions by this Court misses the mark. In each of those cases, the plaintiffs had rights or entitlements that were taken away or impaired as a result of challenged race conscious state action. Here, however, none of appellants' voting rights as white voters were infringed or eradicated by North

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6. Assistant Attorney General Dunne's letter is reprinted in the appendix to the Jurisdictional Statement filed by appellants in *Pope v. Blue* ("J.S. App."). Appellants have filed copies of that statement with the Clerk of this Court. *See* App. Br. at 7 n.2.

7. The Attorney General's letter disapproved North Carolina's first Congressional redistricting plan on the grounds that minority voting rights would be diluted in the south-central to southeastern part of the State, "even though its seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." Letter from John R. Dunne, Assistant Attorney General, to Tiare B. Smiley, Esq., Special Deputy Attorney General (Dec. 18, 1991) (hereafter "Dunne Letter"); J.S. App. at 59a.

8. Significantly, in this case, as the Republican National Committee has argued in its *amicus* brief, the noncompact shape of North Carolina's second majority-minority district resulted, not from any racially discriminatory motive, but rather from the usual partisan political goal of preserving incumbents. *See* Brief of *Amicus Curiae* Republican National committee at 5.

Carolina's recent redistricting (*see supra* at 12-15). For that reason alone, this Court's recent equal protection decisions are inapposite.

For example, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a minority set-aside for city construction subcontracts denied non-minority citizens "the opportunity to compete for a fixed percentage of public contracts based solely upon their race." If qualified, those non-minority citizens were entitled to compete for those public contracts. *Id.* at 493 (plurality opinion). Similarly, in *Batson v. Kentucky*, 476 U.S. 79 (1976), *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991), and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 111 S. Ct. 2077 (1991), this Court held that civil and criminal litigants, regardless of their race, had a right to a jury that was not tainted by racial discrimination in its selection process. The Court further held that all persons, regardless of their race, have a right to serve on juries, and that exclusion of jurors on the basis of their race undermines public confidence in the jury system. *See Batson*, 476 U.S. at 85.

Here, in contrast, appellants' right to vote has not been impaired by the Plan. Appellants have not lost the right to vote, nor have procedural roadblocks been put in place to discourage whites from registering or voting. The most that appellants can argue is that they are less likely to elect a white representative of their choosing as a result of North Carolina's Plan — but they have no constitutional right to do so. *See Whitcomb*, 403 U.S. at 154.[9] Nor do they have a constitutional right to disproportionate representation in Congress; the Constitution was not designed to preserve such inequality.

9. Appellants' reliance on *Freeman v. Pitts*, 503 U.S. ___, 112 S. Ct. 1430 (1992), is even more misplaced. Appellants' quotation of snippets of that opinion, taken entirely out of context, can not make that holding relevant to this voting rights case. That decision reviewed when a court should reduce or eliminate its supervision of a school district's compliance with a court ordered desegregation plan. This Court did not reject the use of race for remedial purposes in *Freeman*; rather, the Court simply established certain criteria to consider in deciding when a school desegregation goal had been sufficiently achieved to warrant ending federal court supervision. That holding has no applicability to a Voting Rights Act case where every redistricting decision raises anew the possibility of discrimination against minority voting rights.

In sum, unlike the successful plaintiffs in *City of Richmond* and the *Batson* line of cases, appellants lost no constitutionally protected rights when North Carolina adopted the Plan. Appellants are not the victims of racial discrimination in voting. That is why they have no constitutional claim.

II. NORTH CAROLINA'S FAILURE TO ADOPT THE PLAN SUGGESTED BY THE ATTORNEY GENERAL DOES NOT MAKE NORTH CAROLINA'S REDISTRICTING PLAN CONSTITUTIONALLY SUSPECT.

In response to the 1990 census, North Carolina initially proposed a redistricting plan that included only one district in which a majority of the eligible voters were minorities. When that plan was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, the Attorney General refused to pre-clear the plan, reasoning that a second majority-minority district was necessary to pass Voting Rights Act scrutiny and noting that such a district could be drawn in south-central to southeastern North Carolina. J.S. App. at 59a-60a. North Carolina then drew a second redistricting plan, with a second majority-minority district, albeit not in the area the Attorney General had identified. The Attorney General approved that plan. The specific question certified by this Court is whether North Carolina's failure to locate a second majority-minority district where the Attorney General suggested makes North Carolina's Plan constitutionally suspect. ___ U.S. ___, 113 S. Ct. 653-54.

The answer to that question is no, even apart from the fact that appellants as white voters suffered no injury from North Carolina's race conscious redistricting and the Court therefore need not even reach this question. (*See* Point I *supra*.) In *UJO*, this Court held that race conscious redistricting in order to comply with the Voting Rights Act is constitutional. 430 U.S. at 155-61. That holding does not depend upon whether the state involved is complying with a suggestion by the Attorney General or whether it is even subject to the preclearance requirements of Section 5 of the Voting Rights Act;

race conscious redistricting, absent an impermissible dilution of majority voting rights, is constitutional, plain and simple.

Thus, consistent with its earlier decisions interpreting the Voting Rights Act, this Court broadly held in *UJO* that "the Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5 [of the Voting Rights Act]." *Id.* at 161; *see also Beer v. United States*, 425 U.S. 130 (1976) (Voting Rights Act prohibits reapportionments that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise); *City of Richmond v. United States*, 422 U.S. 358 (1975) (Voting Rights Act's proscribed effect on voting rights can be avoided by plan fairly reflecting minority community's strength as it exists after annexation and affording representation reasonably equivalent to minorities' political strength in the enlarged community); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (change from district to at-large voting had to be precleared under § 5 due to the potential for dilution of minority voting power which could nullify minority voters' ability to elect the candidate of their choice).

In short, *UJO* cannot be limited to situations in which a state's race conscious redistricting is merely in compliance with a particular suggestion by the Attorney General.

Moreover, there are logical and practical reasons to reject such a rule.

A. It Is Not The Attorney General's Role To Immunize Redistricting Plans From Constitutional Challenge.

There is no principled constitutional or statutory basis to hold that race conscious redistricting is valid when done in conformance with a suggestion by the Attorney General and suspect when not.

First, the use of race as a factor in drawing district lines in this case is either constitutional or it is not. Whether those lines were drawn by the Attorney General or by the North

Carolina legislature makes no difference to the constitutional inquiry. The use of race in drawing the district lines at issue is either discriminatory or it is not; the intent to use race is either invidious or it is not. The identity of the line drawer is not a decisive factor.

Second, in any event, it is not the Attorney General's role to draw or suggest redistricting plans for covered jurisdictions. The role of the Attorney General in a § 5 case is limited. When a covered state seeks to institute a voting change it may either (1) seek a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (2) submit the change to the Attorney General. 42 U.S.C. § 1973c. If the second option is selected, the change may be enforced so long as the Attorney General has not objected within sixty days after the submission. *Id.*; *see United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 136 (1978). Whether the Attorney General fails to object to a submission or affirmatively indicates that no objection will be made, a complaining party may still bring "a subsequent action to enjoin enforcement of the voting change." 42 U.S.C. § 1973c. If such an action is brought by the state, or a challenge is filed by minority voters, the Attorney General's response to a submitted change is in no way dispositive of the constitutionality of the submitted legislation. *See Morris v. Gressette*, 432 U.S. 491, 505 (1977).

In reviewing a proposed redistricting plan, the Attorney General makes the same determination that would be made by the district court in a declaratory judgment action: "Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.52(a). If the Attorney General is not able to determine that the change is free of discriminatory purpose and effect, "an objection shall be interposed." 28 C.F.R. § 51.52(c). The regulations list several factors that the Attorney General will consider in determining whether a submitted change will have the prohibited purpose or effect. *See*,

e.g., 28 C.F.R. § 51.57 (factors relevant to any change affecting voting); 28 C.F.R. § 51.59 (factors relevant to redistricting plans). But nowhere in the Act or the regulations is there any requirement that the Attorney General suggest or draw new district lines that, in his view, comply with the Voting Rights Act. That is not his role. Nor is there anything in the Act requiring a covered jurisdiction to adopt any suggestions by the Attorney General or be subject to constitutional challenge.

Thus, in the § 5 cases decided by this Court, the Attorney General has routinely explained his reasons for objecting to a proposed plan but has not offered specific alternative plans that he stated he would preclear. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 466 (1987) (Attorney General objected because he found city's refusal to annex an adjacent black neighborhood along with the annexation of two parcels of land — one vacant and the other inhabited by a few whites — indicative of an intent to annex only white areas); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (Attorney General objected to new election procedures "to the extent that they incorporate[d] at-large elections, [a] numbered-post system and staggered terms for councilmen"); *Upham v. Seamon*, 456 U.S. 37, 38 (1982) (Attorney General objected to Texas' reappointment plan based on the lines drawn for two districts in South Texas); *City of Port Arthur v. United States*, 459 U.S. 159, 163 (1982) (Attorney General refused to preclear plan under which city council members were to be elected at-large and subject to residency requirements, suggesting that he would "reconsider" if the members were elected from fairly drawn single-member districts); *City of Rome v. United States*, 446 U.S. 156, 161-62 (1980) (Attorney General declined to preclear various electoral changes and annexations submitted, explaining that the former "would deprive Negro voters of the opportunity to elect a candidate of their choice," and that with respect to the latter the city had failed to carry its burden that they "would not dilute the Negro vote"); *Morris v. Gressette*, 432 U.S. at 498 (Attorney General's objection was that he was not able to conclude that the submission did "not have the effect of

abridging voting rights on account of race"). Simply put, it is not the Attorney General's responsibility to draw district lines that comply with the Voting Rights Act.

Indeed, this Court has often recognized that, under our system of federalism, redistricting decisions traditionally belong to the states. As this Court noted recently, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley v. Etowah County Comm'n*, 502 U.S. ___, ___, 112 S. Ct. 820, 832 (1992). It is beyond question that "redistricting and reapportioning legislative bodies is a legislative task," *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), which "deals with fundamental 'choices about the nature of representation,' [and] is primarily a political and legislative process," *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)).

Thus, even where a federal court finds that a proposed electoral change is unconstitutional or violates the Voting Rights Act or some other applicable statute, this Court has held "that, in the normal case, a court . . . should enjoin implementation of [the invalid] plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981); *see also Wise*, 437 U.S. at 540 (proper course is to give state legislators an opportunity to correct deficiencies "by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan").

Accordingly, giving decisive constitutional weight to a "suggestion" by the Attorney General during the § 5 preclearance process would constitute a fundamental shift away from this Court's traditional deference to the states in their drawing of redistricting plans. There is, we submit, no basis in the Constitution or the Voting Rights Act to give that authority to the Attorney General.

Moreover, there is substantial reason to doubt that the Department of Justice could efficiently and effectively take

on the responsibility of not only approving or objecting to electoral changes from covered jurisdictions, but also suggesting new redistricting plans. In *Clark v. Roemer*, 500 U.S. ___, ___, 111 S. Ct. 2096, 2102 (1991), Louisiana argued that a subsequent preclearance amounted to acceptance of earlier, non-submitted changes to its election process. In rejecting that argument, this Court explained in detail the burdens placed on the Attorney General by § 5 of the Voting Rights Act:

> The Attorney General represents to us that he reviews an average of 17,000 electoral changes each year, and that within the 60-day preclearance period, he must for each change analyze demographics, voting patterns, and other local conditions to make the statutory judgment concerning the presence of discriminatory purpose or effect. Congress has recognized that the Attorney General could not, in addition to these duties, also monitor and identify each voting change in each jurisdiction subject to § 5. "[B]ecause of the acknowledged and anticipated inability of the Justice Department — given limited resources — to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," [*McCain*,] 465 U.S., at 247 . . . , Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes. The District Court's holding upsets this ordering of responsibilities under § 5, for it would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light. Such a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether.

Id. at ___, 111 S. Ct. at 2104.

For exactly those same reasons, it would be administratively disastrous to require the Attorney General to suggest new district lines before a race conscious redistricting plan could pass constitutional muster. The Attorney General has

neither the resources nor the political expertise to take on that responsibility.

Finally, to give dispositive constitutional weight to an Attorney General's suggestions concerning redistricting would fatally undercut voluntary compliance with the Voting Rights Act. In the ideal case, a covered state draws its own redistricting plan, submits it to the Attorney General for review, and receives an immediate preclearance.[10] If this Court holds that race-conscious redistricting plans may be challenged by white voters on constitutional grounds unless the district lines correspond exactly to those suggested by the Attorney General in a § 5 objection letter, it will effectively rule out voluntary compliance with the Voting Rights Act. Such a result, we submit, would be flatly contrary to the whole purpose and administrative scheme of the Act, which are together designed to encourage voluntary compliance. *See* H.R. REP. NO. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284; *Allen*, 393 U.S. 544.[11]

Indeed, such a rule would encourage covered jurisdictions to adopt redistricting plans that do not comply with the Voting Rights Act, wait until the Attorney General objects and suggests an acceptable plan, and then draw a plan that conforms exactly to the Attorney General's "suggestion." That scenario would both make the Attorney General the true author of all redistricting plans for covered jurisdictions and make the goal of voluntary compliance a sham. It would also make it virtually impossible to meet election deadlines in many states.

Such a rule would also be inconsistent with Congress' intent that the same standards apply to a preclearance review

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10. Several covered jurisdictions have obtained preclearance on their first attempt. For example, the most recent congressional redistricting plans of Louisiana, Virginia and Mississippi all received § 5 preclearance without any objection from the Attorney General.

11. *See also* Drew Days, III, Testimony on GAO Report on the Voting Rights Act, Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, 95th Cong., 2d Sess., Feb. 6 and June 15, 1978, at 41; Ball, Krane & Lauth, *The View from Georgia and Mississippi: Local Attorneys' Appraisal of the 1965 Voting Rights Act*, in MINORITY VOTE DILUTION 181-85 (Davidson, ed., Howard University Press).

by the Attorney General as apply to a District Court review of a redistricting plan. *See* 28 C.F.R. § 51.52. It is well established that a district court should not draw its own district lines but rather should defer to the legislative process. *McDaniel*, 452 U.S. at 150 n.30. There is no reason in the Act or elsewhere to give the Attorney General greater authority to draw district lines than the district court has.

A rule giving dispositive constitutional weight to the Attorney General's suggestions would also leave states not subject to § 5 of the Voting Rights Act in an irreconcilable quandary. If such a state wants to avoid a § 2 challenge to its redistricting plan it must take race into account in drawing its new district lines. But because the preclearance process is not available, such a state cannot obtain the safe harbor of conformance to a suggestion by the Attorney General, and the state may therefore be open to suit by disgruntled white voters.

In sum, there is no constitutional, statutory or practical basis for a holding that compliance with a suggestion by the Attorney General determines whether a race conscious redistricting plan is constitutional.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be affirmed.

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